PP

v.

SAMIYAH & ANOR

HIGH COURT MALAYA, SHAH ALAM
YEOH WEE SIAM JC
[CRIMINAL TRIAL NO: 43-53-2009]
1 DECEMBER 2009

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Accused released on bond of good behaviour pursuant to s. 294 Criminal Procedure Code upon conviction under s. 420 Penal Code - Accused Indonesian nationals without travel documents and serving term of imprisonment for immigration offence - No means to ensure compliance with conditions of bond - Whether learned Magistrate erred in applying s. 294*

CRIMINAL PROCEDURE: *Sentence - Binding over - Accused convicted under s. 420 Penal Code - Whether binding over only to be imposed where there are means to ensure that conditions of bond are complied with - Whether s. 294 applicable only to offenders who are in the country - Criminal Procedure Code, s. 294*

Samiyah and Astri ("the two accused") were charged under s. 420 of the Penal Code. They were alleged to have attempted to cheat Mydin Supermarket by changing the original price tags of several goods to price tags for a lesser amount up to a difference of RM935.65, thereby causing such loss to the supermarket. The two accused pleaded guilty. Upon conviction, the Magistrate bound them over for good behaviour under s. 294 of the Criminal Procedure Code ("the CPC") under a secured bond of RM1,500 in 1 surety for each accused. However, at the end of the day, the Magistrate realised that he had made a mistake since it would be impossible for the two accused to fulfil the conditions in the bond considering that they were Indonesian nationals and did not possess any travel documents. The two accused were also serving a term of imprisonment for another offence under s. 6(1)(c) of the Immigration Act 1959/63. As such, the High Court called up the case for revision.

Held (setting aside order of Magistrate):

(1) A bond under s. 294 of the CPC can only be allowed if there is a means for the court to ensure that the conditions of the bond are complied with. From the provisions of s. 294(1), (3)

A and (5) of the CPC, it could be clearly seen that the bond of good behaviour was not suitable for the two accused. Once the two accused were deported, the court had no way of ensuring that they were keeping the peace and are of good behaviour. For proper and effective enforcement, the bond under s. 294 of the CPC should only be granted to offenders who are still in the country. (paras 21, 22, 23 & 24)

(2) The Magistrate's decision to grant the bond of good behaviour to the two accused was therefore improper and incorrect under s. 323 of the CPC. Accordingly, the two accused had to be sentenced for their offence under s. 420 of the Penal Code. (para 25)

(3) Taking into account the fact that the two accused were females, that the amount involved in was only RM935.65, that the previous conviction of the two accused was under the Immigration Act 1959/63 and not for a similar offence and that they had saved the court's time and costs of prosecution by pleading guilty, the two accused were sentenced to one year's imprisonment with effect from the date of arrest. (paras 28 & 29)

Case(s) referred to:
Amit Budin v. PP [1994] MLJU 212 ***(refd)***
Gek Singh Kaliappan v. PP [1999] 4 CLJ 292 HC ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP v. Mustafa Abu Bakar [2009] 1 LNS 1237 HC ***(refd)***
Winston Rajah v. PP [1999] 1 CLJ 315 HC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 289, 294(1), (3), (5), 323
Immigration Act 1959/63, s. 6(1)(c)
Penal Code, s. 420

For the PP - Isa Hj Hassim DPP
For the two accuseds - Dato' Taqiyuddin Hj Yahya; M/s Taqiyuddin & Partners

Reported by Amutha Suppayah

JUDGMENT

Yeoh Wee Siam JC:

[1] This is an application by the learned magistrate of the Petaling Jaya magistrate's court ("the magistrate") for revision of his decision made on 23 November 2009.

Brief Facts

[2] Samiyah and Astri ("the 2 accused") were charged together with two others under s. 420 of the Penal Code as follows:

> Bahawa kamu pada 5/09/2009 jam lebih kurang 7.20 malam, di Mydin Supermarket, Persiaran Subang Permai, USJ 1, Subang Jaya di dalam Daerah Petaling dalam Negeri Selangor Darul Ehsan telah didapati dengan curang menipu Mydin Supermarket, dengan menukar tanda harga asal kepada tanda harga yang lebih murah, yang mana kerugian lebih kurang RM935.65. Oleh itu, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 420 Kanun Keseksaan yang dibaca bersama Seksyen 34 Akta yang sama.

[3] The two accused pleaded guilty to the charge on 23 November 2009.

[4] The magistrate after finding the two accused, guilty and convicting them, instead of sentencing them at once to punishment, bound them over for good behaviour under s. 294 of the Criminal Procedure Code ("the CPC") under a secured bond of RM1,500 in one surety for each accused.

[5] At the end of the day, the magistrate realised that he had made a mistake since it would be impossible for the two accused to fulfil the conditions in the bond considering that they are Indonesian nationals, and also they do not possess any travel documents at all to be in this country. Moreover, the magistrate found out that currently the two accused are serving a term of imprisonment for another offence under s. 6(1)(c) of the Immigration Act 1959/63 and they would be released within a few days on 27 November 2009.

[6] In view of the above, the magistrate was of the opinion that the two accused should be sentenced with the punishment under s. 420 of the Penal Code.

[7] I Immediately called for the records of the case and fixed the application for hearing on the next day, 24 November 2009.

A **Submissions Of Learned DPP**

[8] During the hearing, the learned DPP submitted that the offence committed by the two accused is a serious one. The accused had gone to the Mydin supermarket and cheated the supermarket by changing the original price tags of several goods to price tags for a lesser amount up to a difference of RM935.65, thereby causing such loss to the supermarket.

[9] The learned DPP pressed for a deterrent sentence since the offence of cheating is a serious offence. He also pointed out that once the two accused have completed serving their sentence on 27 November 2009 for the other offence under the Immigration Act 1959/63, the two accused would be deported to Indonesia and there would be no way of ensuring that they would adhere to the conditions of the bond under s. 294 of the CPC.

Submissions Of Learned Counsel

[10] Learned counsel for the two accused submitted that the two accused are first offenders. The amount involved is only a small amount of RM935.65. He relied on the following cases:

[11] *Winston Rajah v. PP* [1999] 1 CLJ 315 at p. 316 where it was held that the existence of a minimum sentence does not deprive the court from exercising its discretion under s. 294 of the CPC.

[12] *Zaidon Shariff v. PP* [1996] 4 CLJ 441 where it was held that a previous conviction is to be taken into consideration in assessing sentence only if the previous offence is of a similar nature as the one with which the accused is presently charged.

[13] Learned counsel submitted that the previous offence of the two accused under the Immigration Act 1959/63 is not of a similar nature as the one in the present case.

[14] *Amit Budin v. PP* [1994] MLJU 212 where the amount involved is RM4,000, therefore a larger amount than the one in the present case, and yet the court allowed a bond of good behaviour.

[15] Learned counsel prayed for the bond of good behaviour, that was already granted by the magistrate, to be maintained.

[16] However, in the event that the court wishes to sentence the two accused with the punishment under s. 420 of the Penal Code, learned counsel prayed that the two accused's plea of guilt be considered for an appropriate discount of 1/4 to 1/3 of what would have been the sentence had they been found guilty after a trial.

Decision

[17] After considering the grounds of application for revision by the magistrate, and the submissions of both parties, I was of the opinion that, as admitted by the magistrate, the magistrate had erred in fact and law.

[18] Firstly, the magistrate did not know that the two accused, who are already serving a term of imprisonment for four months, would be released on 27 November 2009 for the offence under s. 6(1)(c) of the Immigration Act 1959/63.

[19] Secondly, the two accused cannot be treated first offenders since they do have that one previous conviction under the Immigration Act 1959/63 even though it is not for a similar offence.

[20] Thirdly, the magistrate did not realise at the time when he made his decision that the two accused had no travel documents at all, which means that they would be deported after serving their term of imprisonment for the immigration offence. There would be no way of enforcing the bond of good behaviour since the two accused would no longer be in the country. This would render the bond practically unenforceable and in fact would make the decision of the magistrate look ridiculous.

[21] A bond under s. 294 of the CPC can only be allowed if there is a means for the court to ensure that the conditions of the bond are complied with. Section 294(1) of the CPC empowers the court during the period of the bond to direct the offender "to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour."

[22] Under s. 294(3) of the CPC, if the court is satisfied by information on oath that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for the offender's apprehension.

[23] Under s. 294(5) of the CPC, the offender, who has been remanded, would have to be brought before the court before which he was bound to appear for judgment or to answer as to his conduct since his release under the bond.

[24] From the above provisions of s. 294(1), (3) and (5) of the CPC, it can be clearly seen that the bond of good behaviour is not suitable for the two accused. Once the two accused are deported, the court has no way of ensuring that they are keeping the peace

A and are of good behaviour. The court will have real difficulties in apprehending them for the purpose of judgment for their original offence (see also *Winston Rajah v. PP (supra)*). I believe, for proper and effective enforcement, the bond under s. 294 of the CPC should only be granted to offenders who are still in the country.

B

[25] Going by the above rationale, the magistrate's decision to grant the bond of good behaviour to the two accused is therefore improper and incorrect under s. 323 of the CPC. Accordingly, the two accused have to be sentenced for their offence under s. 420 of the Penal Code.

C

[26] Section 420 of the Penal Code provides for a minimum punishment of not less than one year's imprisonment and a maximum punishment of not exceeding ten years' imprisonment and mandatory whipping, and liability to a fine.

D

[27] The two accused are females and therefore cannot be punishable with whipping as provided in s. 289 of the CPC.

[28] I bear in mind that the amount involved in the offence is RM935.65, not a very big amount, and also the fact that the
E previous conviction of the two accused is under the Immigration Act 1959/63, and therefore not an offence of a similar nature. I considered the plea of guilt which has saved the court's time and costs of prosecution, and sparing the witnesses the inconvenience of coming to court. For that, the two accused should be given an
F appropriate discount in their sentence (see *Mohd Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 and *Gek Singh Kaliappan v. PP* [1999] 4 CLJ 292). I also take judicial notice of the fact that it costs the Government about RM31 to accommodate and maintain a convict in prison (see *PP v. Mustafa Abu Bakar* [2009] 1 LNS 1237, High Court Shah Alam (Petaling Jaya) Criminal trial
G No. 45-10-2004).

[29] In exercise of the court's powers of revision under s. 325 of the CPC, I set aside the order of the magistrate in granting the bond of good behaviour under s. 294 of the CPC to the two
H accused and substituted such order with a sentence under s. 420 of the Penal Code of one year's imprisonment with effect from the date of arrest ie, 5 September 2009. I further ordered that the sentence is to run concurrently with the two accused's present sentence under s. 6(1)(c) of the Immigration Act 1959/63.

I